

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 36447

DANIEL MOWREY,)	2010 Unpublished Opinion No. 373
)	
Petitioner-Appellant,)	Filed: March 4, 2010
)	
v.)	Stephen W. Kenyon, Clerk
)	
SGT. LAHAIE, LT. McKENZIE, DEPUTY)	THIS IS AN UNPUBLISHED
WARDEN MARTIN, WARDEN KIM)	OPINION AND SHALL NOT
JONES, IDAHO DEPARTMENT OF)	BE CITED AS AUTHORITY
CORRECTION,)	
)	
Respondents.)	
)	

Appeal from the District Court of the Second Judicial District, State of Idaho, Clearwater County. Hon. John H. Bradbury, District Judge; Hon. Randall W. Robinson, Magistrate.

Order dismissing petition for writ of habeas corpus, affirmed.

Daniel Mowrey, Boise, pro se appellant.

Hon. Lawrence G. Wasden, Attorney General; Krista L. Howard, Deputy Attorney General, Boise, for respondent.

PERRY, Judge Pro Tem

Daniel Mowrey appeals from the district court's order affirming the magistrate's dismissal of his petition for a writ of habeas corpus. We affirm.

The decision to issue a writ of habeas corpus is a matter within the discretion of the court. *Johnson v. State*, 85 Idaho 123, 127, 376 P.2d 704, 706 (1962); *Brennan v. State*, 122 Idaho 911, 914, 841 P.2d 441, 444 (Ct. App. 1992). When we review an exercise of discretion in a habeas corpus proceeding, we conduct a three-tiered inquiry to determine whether the lower court rightly perceived the issue as one of discretion, acted within the boundaries of such discretion, and reached its decision by an exercise of reason. *Id.*; *Sivak v. Ada County*, 115 Idaho 762, 763, 769 P.2d 1134, 1135 (Ct. App. 1989). If a petitioner is not entitled to relief on an application for a writ of habeas corpus, the decision by the petitioned court to dismiss the application without an

evidentiary hearing will be upheld. *Brennan*, 122 Idaho at 917, 841 P.2d at 447. When a court considers matters outside the pleadings on an I.R.C.P. 12(b)(6) motion to dismiss, such motion must be treated as a motion for summary judgment. *Hellickson v. Jenkins*, 118 Idaho 273, 276, 796 P.2d 150, 153 (Ct. App. 1990).

On review of a decision of the district court, rendered in its appellate capacity, we review the decision of the district court directly. *Losser v. Bradstreet*, 145 Idaho 670, 672, 183 P.3d 758, 760 (2008). We examine the magistrate record to determine whether there is substantial and competent evidence to support the magistrate's findings of fact and whether the magistrate's conclusions of law follow from those findings. *Id.* If those findings are so supported and the conclusions follow therefrom and if the district court affirmed the magistrate's decision, we affirm the district court's decision as a matter of procedure. *Id.*

Daniel Mowrey is an inmate in the custody of the Idaho Department of Correction (IDOC). In January 2007, a book entitled "Castle & Keeps" was confiscated from Mowrey while housed at the Idaho Correctional Institute-Orofino. Mowrey submitted a concern form to the IDOC asking why his book violated policy. The IDOC responded that role-playing games and books are not allowed pursuant to the mail policy. Mowrey grieved the taking of his book. His grievance was denied by IDOC officers on the basis that standard operating procedure 320.02.01.001 does not allow role-playing games, magazines, books or materials. Mowrey appealed the denial of his grievance to the Warden who upheld the denial.

In February 2007, Mowrey submitted a second concern form inquiring why an order form and a letter to his brother had been taken from the envelope in which they had been mailed. The IDOC responded that Mowrey was attempting to order prohibited role-playing materials.

Mowrey filed a petition for writ of habeas corpus. Mowrey claimed that he was being denied the right to create unique works for publication because he was denied access to role-playing books in violation of his First Amendment rights. Mowrey also alleged that his right to due process under the Fourteenth Amendment was violated by the IDOC's blanket censorship of role-playing materials.

The magistrate ordered that the IDOC respond to Mowrey's petition. The IDOC filed a response and also a motion to dismiss and/or summary judgment with supporting affidavits. Mowrey then filed a reply and his own motion to dismiss and/or summary judgment along with an affidavit in support. The IDOC filed a further reply.

The magistrate thereafter issued an order dismissing Mowrey's petition. With respect to Mowrey's claim that he had not been allowed to order books in February 2007, the magistrate held that Mowrey had failed to show that he had exhausted all administrative remedies available to him and had not therefore preserved the issue for habeas corpus. With respect to the IDOC's policies that ban all role-playing materials, the magistrate relied on *Bahrampour v. Lampert*, 356 F.3d 969 (9th Cir. 2004) wherein the Ninth Circuit applied the United States Supreme Court's analysis set forth in *Turner v. Safley*, 482 U.S. 78 (1987). The magistrate held that the IDOC policies were based on a legitimate penological interest and did not violate Mowrey's constitutional rights. Mowrey appealed the magistrate's decision to the district court. Following briefing and oral argument, the district court affirmed.

On appeal to this Court Mowrey again argues that the magistrate erred in dismissing his petition. We begin by noting that we agree with the Courts below on Mowrey's first claim. Mowrey has failed to provide a sufficient record showing that he exhausted administrative remedies on the taking of his order form from the outgoing mail in February 2007. Although Mowrey filed an initial concern form he did not continue to grieve and then administratively appeal the claim. Unlike the taking of "Castle & Keeps" incident in January, this later occurrence from February has not been preserved for habeas corpus. Accordingly Mowrey has failed to show any error in the magistrate's dismissal of this issue and we will not discuss it further.

Mowrey does not claim that "Castle & Keeps" does not fall under the IDOC regulations as role-playing materials. Rather he insists that his purpose for possessing the materials is an innocent one, to aid him in his creative writing. Therefore, according to Mowrey, the IDOC's response by banning all role-playing materials is "exaggerated." He further contends that possession of the books for non-playing activities should be permissible. Finally he argues that the policy is vague.¹

The IDOC adopted as a statewide policy the prohibition of role-playing games in 2002. In 2007, the IDOC amended its Standard Operating Procedure to reflect that role-playing games are considered contraband and will be confiscated and disposed of according to the policy. In

¹ As to Mowrey's vagueness argument we conclude that this issue was not raised before the magistrate and therefore has not been preserved for appeal. Accordingly, we do not address it.

response to Mowrey's petition the IDOC submitted the affidavit of Jeff Zmuda, an IDOC employee for over twenty years. In his affidavit Zmuda detailed the chronological development of the policy banning role-playing materials and its purposes. Zmuda averred that:

19. The purpose of banning role-playing games and materials whether they are published games, books or written by an inmate is related to a legitimate penological interest. The IDOC does not ban role-playing games and materials as a means in which to control offender property. Role-playing games and materials have been banned to ensure security and safety of the staff and inmates and to maintain the order and discipline of running the IDOC institutions. Role-playing games and materials present the potential for an inmate to lose their perspective on reality and a propensity to act out in a violent manner. Role-playing games and materials put inmates into role-playing characters wherein the inmate acts in a role of violence, dominance and control over other inmates who also engage in role-playing games. These role-playing scenarios potentially put the staff and inmates security, safety and institution's order and discipline at issue.

20. Role-playing games and materials are not a pro-social activity in a prison setting because inmates engage in roles in that they commit acts of violence against each other, they take property from each other, and they degrade each other. These types of actions lead to repercussions in which the inmates retaliate against each other through control.

21. The IDOC has a legitimate penological interest in banning role-playing games and materials because of staff and inmate security and safety, maintaining the order and discipline of all IDOC institutions, which is essential to the orderly operation of the IDOC institutions and facilities.

22. Role-playing games and materials potentially threaten the safety and security of the inmates, IDOC staff, volunteers, visitors and the public. An inmate's retaliation in response to the role-playing game potentially could lead to violence amongst the inmates putting staff, visitors, volunteers and inmates at risk for their safety. There is the potential that a breach of security could arise in the event that the inmates incite a riot as a result of the violence that may ensue as a result of the role-playing games and put the public's security at risk.

We conclude that the facts of Mowrey's case are almost indistinguishable from those in *Bahrapour*. In *Bahrapour* the Court considered whether prison authorities in Oregon had the power to ban role-playing games and remain consistent with constitutional principles. Applying the analysis set forth in the United States Supreme Court decision in *Turner*, the Ninth Circuit upheld Oregon's policy of prohibiting role-playing games. The Court applied the four-part test of content neutrality, the availability of alternative means, the potential effects of rejecting the policy, and alternative solutions.

In Mowrey's case the magistrate followed the same analysis. In a well-reasoned opinion the magistrate determined that the IDOC's ban on role-playing materials is rational and not

subject to constitutional attack by Mowrey. The magistrate found that the IDOC policy prohibiting role-playing materials serves a legitimate penological interest with alternative means in place for IDOC inmates. The magistrate further found that the IDOC's policy meets the *Turner* standards as set forth in *Bahrampour*. The magistrate then concluded that there remained no genuine issue of material fact and that summary judgment in favor of the IDOC was appropriate.

The magistrate's findings of fact are supported by substantial and competent evidence in the record. The magistrate's conclusions of law follow from those findings. On appeal the district court affirmed. Upon review we conclude that Mowrey has failed to show error by the courts below and therefore pursuant to our standard of review affirm the district court as a matter of procedure. The order dismissing Mowrey's petition for habeas corpus is affirmed.

Judge GRATTON and Judge MELANSON **CONCUR.**